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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JOHN ALBAY GALAFATE, Defendant and Appellant.	F075314 (Super. Ct. No. BF156797A) **OPINION**

APPEAL from a judgment of the Superior Court of Kern County. John D. Oglesby, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

A jury convicted John Albay Galafate (defendant) of first degree murder (Pen. Code,[1] § 187, subd. (a) [count 1]) and elder abuse (§ 368, subd. (b)(1) [count 2]). At trial, defendant admitted to killing the 88-year-old victim but denied he intended to kill him. The trial court sentenced defendant to state prison for an indeterminate term of 25 years to life on count 1 and imposed a determinate term of four years on count 2 that it stayed pursuant to section 654. Defendant was awarded 933 days of actual custody credit.

Defendant challenges his conviction, asserting the trial court committed reversible error by failing to sua sponte instruct the jury regarding mistake of fact as to kidnapping/felony murder resulting in a violation of defendant's rights to due process, a fair trial, and a jury trial. He also asserts the abstract of judgment for the indeterminate term should be amended to reflect custody credit.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Eighty-eight-year-old John Espinoza lived in Delano, California where he also rented out property. Defendant and his family leased property owned by Espinoza.

Espinoza's son Andrew Espinoza lived in Long Beach, California.[2] They spoke twice a day by phone, once in the morning and once at night. Espinoza did not answer Andrew's evening calls on September 18, 2013, nor his calls the following morning. Andrew became concerned and called the police, the hospital, Espinoza's girlfriend, and a friend of Espinoza's, Roger Gadiano. Gadiano went to Espinoza's house but Espinoza was not there. Andrew drove to Delano around noon and met Gadiano at Espinoza's residence. The door was unlocked but everything else seemed to be in order.

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[1] Subsequent statutory citations refer to the Penal Code.

[2] Because John Espinoza and Andrew Espinoza share the same surname, Andrew will be referred to by his first name to avoid confusion. No disrespect is intended.

Espinoza, who was a retired barber, had cut his friend Monte Marshall's hair in Espinoza's garage at around 11:00 a.m. on September 18, 2013. Espinoza told Marshall "he would have to make it quick" because he had "to go to one of his rent[al] houses to help a tenant, who he had evicted, to move some furniture out." Espinoza answered a call while cutting Marshall's hair, during which he apologized to the person on the line "that he wasn't there exactly when he told him he would be there."

Andrew and Gadiano drove to defendant's residence, Espinoza's rental property. Defendant told them Espinoza had come over the previous day but left to go and help someone at another property. Andrew and Gadiano then went to the police station.

Delano Police Officer Mendoza investigated Espinoza's disappearance. On September 19, 2013, after searching Espinoza's house, he went to the Friant-Kern Canal where he met a dive team at the bridge. The dive team discovered Espinoza's gray 2013 Hyundai Sonata upside down in the water. As they pulled the car out of the canal, several items fell out of it, including a knife. Delano Police Officer Manuele testified the knife recovered from the car matched a knife block he found in defendant's kitchen.

The fire department pried open the car's trunk where they found Espinoza's remains and a wooden box of tools. Espinoza's body was wrapped in a blanket, his feet and wrists were bound, a shirt was tied around his neck, and a plastic bag was found on or near his head. Coroner and forensic pathologist Robert Whitmore examined Espinoza's body and determined the cause of death to be "drowning, other contributing factors of strangulation and multiple blunt-force injuries, and the manner is homicide."

Mendoza searched defendant's residence and found clear plastic bags in the laundry room that were consistent with the bags found inside the trunk of the car. Dechelle Smothers, a criminalist, tested a stained portion of carpet removed from defendant's home and found the presence of blood. DNA technical lead criminalist Garett Sugimoto explained the DNA in the blood found on defendant's carpet matched that of Espinoza.

At trial, defendant testified on his own behalf. Defendant admitted to killing Espinoza when he came by to collect rent, but defendant denied he intended to kill him. According to defendant, he and Espinoza were inside the property when defendant handed Espinoza the rent money. Espinoza pushed defendant's hand away and said defendant and his family needed to move. Defendant turned around "holding [his] head like [he] was upset." According to defendant, Espinoza then grabbed defendant's shoulder and defendant "turned around," "reacted," and pushed Espinoza harder than he realized. Espinoza fell and hit his head against the wall. Defendant panicked because his wife and children would be coming home, and he did not want them to see Espinoza "laying there dead." He tried to pick Espinoza up, shook him, and tell him he was sorry, but "he was dead." Defendant stated he did not call an ambulance because Espinoza "was already dead." Defendant testified, based on his medical training, he knew that "when a person hits his head and falls to the floor and he's not breathing or not making any kind of movements, that he's dead." When asked what he did next, defendant said:

> "I know it wasn't right, but Mr. Espinoza was already dead. I wanted it to look like something else happened, so I bound his hands and his legs and I did tie a shirt around his neck, but it wasn't tight as – like you heard testimony, said it was tied tight. You know, I just did all that before I put him in the trunk of the car."

Defendant later reiterated when he put Espinoza in the trunk of the car it was his belief that Espinoza had "already passed" because "[h]e wasn't breathing." He was sure Espinoza was dead. Defendant then put Espinoza in the trunk of the car and parked the car across the alley as he waited for his wife and children to come home. Defendant then stayed at home with his wife and kids for a while before driving to the casino. While at the casino, defendant played Keno for about 35 minutes and tried to sell a camera he had found in Espinoza's car. The People introduced surveillance footage of defendant trying to sell the camera to people outside the casino. Defendant also admitted to calling Espinoza's credit card companies on September 18, 2013.

While driving back from the casino about an hour and a half later, defendant drove the car into the canal by leaving the car "in drive" near the bank, getting out, and letting it go. Defendant then ran to a nearby orange orchard where he spent the night before walking home. He denied putting a plastic bag over Espinoza's head or using a knife or hammer on Espinoza. He admitted the knife in Espinoza's car belonged to him, but he stated he had lent it to Espinoza for him to cut a tag off a sweater he had bought for his girlfriend. Defendant admitted lying to police officers when he was interviewed on August 26, 2014. He also admitted he had a 1996 felony conviction for forgery, a 2001 felony conviction for grand theft, and a 2006 felony conviction for forgery.

Following the presentation of evidence, the court instructed the jury defendant could be convicted of first degree murder if: (1) defendant acted willfully with premeditation and deliberation, or (2) under a felony-murder theory that defendant caused the victim's death while committing kidnapping. The court also instructed the jury on defenses to and lesser included offenses of murder including self-defense, accident in the heat of passion, voluntary manslaughter, and involuntary manslaughter. In its instructions, the court clarified that for defendant to have committed kidnapping he must have moved the victim "while the [victim] was still alive." It noted that it wanted "to make it clear to the jury that . . . an element [is], that the victim . . . be alive."

During her closing summation, defense counsel argued Espinoza was dead when defendant placed him in the trunk of his car: "[The prosecution] relies heavily that . . . Espinoza was still alive in that trunk when he was put in the canal, and that's not what happened." She argued defendant did not call an ambulance "[b]ut it doesn't change the fact that Mr. Espinoza was already deceased on the floor in that house. Calling the ambulance, calling the police was not going to change that." She asserted defendant "[b]ound [Espinoza's] wrists, bound his ankles, put him in the trunk, put the shirt around his neck. But Mr. Espinoza was already deceased. . . . [¶] . . . [¶] . . . If Mr. Espinoza was alive . . . he could have been yelling. He could have been shouting. There could

have been some kind of banging on the car trying to get somebody's attention. There was none of that. There was none of that because Mr. Espinoza was deceased." She argued the prosecutor's theory Espinoza was alive when he was placed in the trunk of the car "doesn't make sense"; rather, "if nobody was home, [defendant] would have killed [Espinoza] in his house before putting him in the trunk. But he knew that once he pushed him into the wall, that Mr. Espinoza was already dead." Defense counsel attempted to discredit the pathologist's conclusion that the cause of death was drowning. She argued the prosecution had not established Espinoza was alive in the trunk as would be necessary to establish a kidnapping.

The jury convicted defendant of first degree murder (count 1) and elder abuse (count 2). The trial court sentenced defendant to state prison for an indeterminate term of 25 years to life on count 1. It also imposed a determinate term of four years on count 2, which was stayed pursuant to section 654. Defendant was awarded 933 days of actual custody credit.

DISCUSSION

In two issues on appeal, defendant challenges his conviction and the allocation of custody credit.

I. Sua sponte jury instruction regarding mistake of fact

Defendant first contends the trial court erred by failing to instruct the jury sua sponte on the defense of mistake of fact as to kidnapping/felony murder.

A. Standard of Review

" ' "It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence" ' and ' "necessary for the jury's understanding of the case." ' [Citation.] It is also well settled that this duty to instruct extends to defenses 'if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense

and the defense is not inconsistent with the defendant's theory of the case.' [Citations.]" (*People v. Brooks* (2017) 3 Cal.5th 1, 73 (*Brooks*).)

B. Applicable Law

"Every person who forcibly, or by any other means of instilling fear, steals or takes, or holds, detains, or arrests any person in this state, and carries the person . . . into another part of the same county, is guilty of kidnapping." (§ 207, subd. (a).) Kidnapping "requires a live victim." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 498.)

In *Brook*s, the defendant was convicted of arson causing great bodily injury, first degree murder, and stalking after his ex-lover was found dead in a burning car. (*Brooks*, *supra*, 3 Cal.5th at pp. 16, 19-20.) The jury also found true a special circumstance allegation that the murder was committed during the commission of kidnapping. (*Id.* at p. 16.) After the close of evidence, the defense asked the court to instruct the jury regarding ignorance or mistake of fact as to the kidnapping-murder special circumstance allegation because defendant mistakenly believed he had killed the victim by strangling her; thus, he "mistakenly believed that [the victim] was dead when he placed her on the floorboard of her own car and drove off." (*Id*. at p. 71.) The court refused the mistake of fact instruction. (*Id*. at pp. 71-72.)

On appeal, the defendant argued his belief the victim was dead before he moved her "meant he did not commit a kidnapping for purposes of the special circumstance allegation because a movement of the victim is a required element of kidnapping, and the victim must be alive to be kidnapped." (*Brooks*, *supra*, 3 Cal.5th at p. 74.) The *Brooks* court noted that "a court has a sua sponte duty to instruct on a mistake of fact defense to kidnapping when there is substantial evidence that the defendant mistakenly believed the victim was dead at the time of the asportation." (*Id*. at p. 71.) But it concluded the trial court had no sua sponte duty to instruct on a mistake-of-fact defense in connection with the kidnapping-murder special circumstance allegation in that case because:
(1) "defendant was not relying on a mistake of fact defense at trial, and such a defense

was arguably inconsistent with the defense he did present to the jury"; and (2) there was not "substantial evidence that defendant honestly and reasonably believed he had killed [the victim] when he strangled her," noting "[d]efendant did not testify at trial" and the other testimony did not suggest any such belief. (*Id*. at pp. 74-75.) The California Supreme Court noted "[t]he defense theory was not that [the victim] was alive but defendant honestly and reasonably believed that she was dead." (*Id*. at p. 74.) Rather, it was that defendant killed the victim when he strangled her in the heat of passion. (*Ibid*.) And counsel "vigorously refuted the medical examiner's opinion that [the victim] was alive at the time of the fire." (*Ibid*.) Accordingly, because the defense did not request such an instruction, the court did not err in failing to give it. (*Id*. at p. 75.)

C. Analysis

Defendant contends the trial court was required to sua sponte instruct the jury regarding mistake of fact as to kidnapping/felony murder because he testified that he believed Espinoza was dead when he put him into the trunk of his car. He asserts that such an instruction was critical to his defense "that he believed in good faith that Espinoza was already dead before applying ligatures and transporting Espinoza ultimately to the canal where Espinoza drowned."

Defendant does not contend he was relying on a mistake-of-fact defense at trial. Thus, to merit a sua sponte mistake-of-fact instruction he had to establish " 'there is substantial evidence supportive of such a defense *and* the defense is not inconsistent with the defendant's theory of the case.' " (*Brooks*, *supra*, 3 Cal.5th at p. 73, italics added.) But here, as in *Brooks*, such a defense was inconsistent with the defense he presented to the jury – that Espinoza was in fact dead when defendant placed him in the trunk of the car. (See *id.* at pp. 74-75.) Indeed, the defense theory was that defendant actually killed Espinoza, unintentionally, when he pushed him into the wall. Defendant challenged the medical examiner's opinion that Espinoza was alive when defendant placed him in the

trunk. Thus, an instruction on the defense of reasonable but mistaken belief Espinoza was dead would have been inconsistent with defendant's theory of the case.

Notably, here, unlike in *Brooks*, defendant testified he believed Espinoza died after hitting his head against the wall. But the evidence also established defendant bound Espinoza's hands and feet together before placing him in the trunk, undermining his argument that he honestly and reasonably believed Espinoza was dead when he placed him in the trunk. Regardless, *Brooks* requires substantial evidence of such a defense *and* that the defense is not inconsistent with defendant's theory of the case. (See *Brooks*, *supra*, 3 Cal.5th at p. 73.) And we have already concluded such a defense was inconsistent with defendant's theory of the case. Accordingly, as the California Supreme Court held in *Brooks*, we cannot conclude the trial court erred in failing to sua sponte instruct the jury regarding mistake of fact.

We reject defendant's first contention.

II. Custody credit

Defendant also contends the trial court correctly calculated 933 days of presentence credit, but the trial court erred in reflecting the credit on the abstract of judgment for the determinate term, which was stayed, as opposed to on the abstract of judgment for the indeterminate term. Defendant asks us to amend the indeterminate abstract of judgment to reference the credits listed on the determinate abstract of judgment. The People respond defendant "received the correct amount of custody credits, which are applied to his sentence as a whole. Each abstract of judgment cross-references the other . . . indicating they are part of a single judgment and sentence, so there is no possibility the custody credits will not be applied appropriately." We agree with the People.

Sentencing for the indeterminate crime of murder is governed by section 190 and sentencing for determinate-term crimes is governed by sections 1170 and 1170.1. Sentencing under these two schemes is performed separately and independently from one another and denoted on separate forms. (*People v. Neely* (2009) 176 Cal.App.4th 787, 797.) Only after each is determined are they added together to form the aggregate term of imprisonment. (*Ibid*.) Section 2900.5 provides for the application of custody credit to a defendant's term of imprisonment: "In all felony . . . convictions, . . . when the defendant has been in custody . . . all days of custody of the defendant . . . shall be credited upon his or her term of imprisonment . . . in the discretion of the court imposing the sentence." (*Ibid*.)

The abstract of judgment here consists of two forms – one for an indeterminate sentence and one for a determinate sentence – which each reference the other. The indeterminate sentence form lists the 25 years to life sentence imposed for count 1. The determinate sentence form lists the stayed upper term for count 2. On the count 1 abstract, under the section denoting "CREDIT FOR TIME SERVED," the clerk noted, "SEE CR 290" (the determinate sentence form). The abstract shows the clerk did not apply custody credits to one count or the other, but rather treated the two forms together as one abstract of judgment, and thus the custody credits apply to the sentence as a whole. We find no error in the application of defendant's custody credit to his aggregate term of imprisonment.

We reject defendant's second contention.

DISPOSITION

The judgment is affirmed.

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DETJEN, Acting P.J.

WE CONCUR:

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FRANSON, J.

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SNAUFFER, J.